Supreme Court, U.S.
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In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY, A DELAWARE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the four-year "catch-all" limitations period of 28 U.S.C. §1658 apply to new causes of action created by public law 102-166, 105 Stat. 1071, the Civil Rights Act of 1991, which were codified at 42 U.S.C. §1981(a) and (b)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are, EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, DOROTHY JEAN EPPS, ELLIS JACKSON, SR., ETHYL WILLIAMS, WILLIE MOORE, EDDIE MCGEE, JAMES NEVILS, JR., JOSEPH BEVILL, SR., MARY BECKUM, CLARENCE BOLDS, EDITH BOWLES, CURTIS BROWN, TOM GRIFFIN, MARGIE HARRIS, MAURICE HAYES, ALBERT JACKSON, VENNIE LAWSON, RAYMOND LEWIS, HELLEN HARRIS, DAVID ARMSTRONG, DONNA BENNETT, ALBERT WALKER, ROSE M. SMITH, JOSEPHINE LOVE, FLOYD POPE, ERNESTIN JAMISON, TOMMY MOORE, RECHINNA SHELTON, FRANK MORRIS, VIEEN LEE, ELMORE DOBSON, ROSIE SMITH JAMES STROUD, EUNICE SIMON, HAROLD SMITH, RICHARD MEBANE, CHARLES COLLIER, PHIL JAMES, LOTTIE SHELTON, EDGAR PATTON, ROBERT JACKSON, THLEMA TOWNSEND, LUTHER WARD, JUANITA WALKER, THELMA WESTBROOK, GERALDINE CRENSHAW, GLENDA BELL, FLOYD POPE, JOHN W. ADAMS, JAMES S. ADAMS, JAMES TATE, LUELLA BRADFORD, CHARLIE MAE GILREATH, ERTHA HAYNES, ANNIE WELLS, CATHERINE JAMES, MELVIN HAMILTON, WENDELL SHUMATE, JOHN GREGORY, CLEVELAND ROBERTSON, CHARLES HARRIS, EVELYYN FOSTER, DONALD GRUNDY, RONALD CARTER, OTIS MIXON, ROOSEVELT DIXON, HARVEY MORRIS, THELMA TOWNSEND, ALBERT T. WALKER, BRENDA WASHINGTON, PEARLIE BENNETT, MAURICE JACKSON, ALICE F. JONES SMITH, PATRICIA LUCCADO, EDITH J. BOWLES, MILDRED SADDER, EVELYN FOSTER, JUANITA

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Respondent

R.R. Donnelley is a corporation, which is publicly traded. Petitioners are unaware of any publicly traded company that owns ten (10%) percent or more of said corporation's stock. Respondent Donnelley was the defendant in the District Court and the Appellant in the Seventh Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Seventh Circuit order denying the timely petition for rehearing and rehearing en banc is at App A at 1a. The Seventh Circuit opinion (App. B at 3a) is reported at *Jones et al v. R.R. Donnelley*, 305 F.3d 717 (7th Cir. 2002). The District Court opinion (App. C at 28a) is reported at *Jones et. al. v. R.R. Donnelley*, 149 F.Supp.2d 459 (N.D.Il. 2001).

JURISDICTION

The opinion of the United States Court of Appeals was decided on September 16, 2002. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on November 21, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. Public Law 102-166, 105 Stat. 1071 (Civil Rights Act of 1991, codified at 42 U.S.C. § 1981 (a) and (b);

B. Revised Statutes § 1977 (42 U.S.C. § 1981, Civil Rights Act of 1866);

C. Public Law 101-650 Sec. 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990, as amended).

Public law 102-166, 105 Stat. 1071
(42 U.S.C. § 1981(a) and (b) of the Civil Rights Act of 1991) provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exaction's of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Revised Statutes § 1977 (42 U.S.C. § 1981 Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and

> property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Public law 101-650 Sec. 313 (28 U.S.C. § 1658 Judicial improvements act of 1990) which was enacted on December 1, 1990, contained only section (a) and was subsequently amended in July 2002 to add section (b), and provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of--
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

STATEMENT OF THE CASE

This case was filed on November 25, 1996 as a nationwide class action alleging race discrimination under

Section 1981(b) of the Civil Rights Act of 1991. The class consists of all African American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division (CMD) and who were discharged during the shutdown of that division and were not transferred to another Donnelley division. The shutdown of the division took place during the period of January 1993 through early 1995. During that time period R.R. Donnelley terminated approximately 586 African-American employees from the CMD. The data produced by Donnelley shows that 24.9% of all white employees were transferred to other divisions while only 2.3% of the African-American employees were transferred.

Defendant filed a motion for partial summary judgment against those Plaintiffs whose employment terminated prior to November 26th, 1994 (the two-year Illinois personal injury statute of limitations). District Court Judge Matthew Kennelly found that the statute of limitations for a claim under section 1981(b) of the Civil Rights Act of 1991 is controlled by the "catch-all" statute of limitations codified at §28 U.S.C. §1658, (Judicial Improvements Act of 1990 as amended) and is thus four years. Because this cause of action was filed on November 25, 1996, the statute of limitations under Judge Kennelly's ruling reaches back to November 25, 1992. All claims in this lawsuit fall under the 1991 Civil Rights Act and are timely under the four-year statute.

The Seventh Circuit panel reversed the decision of the District Court, holding that Congress intended to have §1658(a) apply only when Congress establishes a new cause of action and does not apply to statutes that have "roots in" or "otherwise reference" laws that preexist §1658 (*Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002).

Plaintiffs therefore, timely petitioned for rehearing and rehearing *en banc*, which was denied on November 21, 2002.

REASONS FOR GRANTING THE PETITION

1. There is a split in the Circuits regarding the effect of §1658 (the "catch all" statute of limitations) as it relates to claims under Section 1981(b) of the 1991 Civil Rights Act.

The issue raised in this case is of exceptional importance because there is a split in the Circuits regarding the effect of §1658 (the federal "catch all" statute of limitations) on §1981(b) of the Civil Rights Act of 1991. Section 1658 provides for a four-year statute of limitations for all civil actions arising under an Act of Congress enacted after December 1, 1990 unless the Act provides for its own statute of limitations. *See*, 28 U.S.C. § 1658. Despite the clear language of that statute, the Circuit Courts are split on the effect of §1658 on civil actions that arise under §1981(b) of Civil Rights Act of 1991.

The Tenth Circuit found that claims which this Court in "*Patterson* said could not be brought under the pre-1991 version of §1658, but which can be made only by virtue of §1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658. Section 1658 applies to those claims." *Harris v. Allstate Insurance Co.*, 300 F.3d 1183, 1189-90 (10th Cir. 2002). In so ruling the 10th Circuit adopted, almost verbatim, the reasoning of the District Court in petitioners' case. However the Seventh Circuit, and a split Third Circuit, has held that §1658 does not apply to acts, like the 1991 Civil Rights Act, which has "roots" in previous laws. *Jones v. R.R. Donnelley*, 305 F.3d

717, 721 (7th Cir. 2002). *Zubi v. A T & T*, 219 F.3d 220, 225-6 (3rd Cir. 2000)

The Sixth, Ninth and Eleventh Circuits have been presented with cases in which the impact of §1658 upon §1981(b) was raised, but did not address the issues directly. *See, Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998) (remanding question to the district court to determine whether §1658 applied, District Court then decided in favor of the four year statute of limitations, 1999 U.S. Dist. LEXIS 22487, *14-17); *Flores v. Coley*, 72 F.3d 135 (9th Cir. 1995) (determining that, because of the date of the allegedly discriminatory conduct, resolution of the §1658/§1981(b) issue was not required.); *Taylor v. Alabama Intertribal Council Title IV JTPA*, 261 F.3d 1032, 1033 (11th Cir, 2001) (because civil rights action under §1981 could not be maintained against Native American tribe, resolution of the §1658/§1981(b) issue was not required).

As the District Court below and the Tenth Circuit noted in their respective rulings, there were more than 25 separate district court opinions at the time of the district court decision herein, with conflicting positions regarding the applicability of §1658 to §1981(b) claims. *Harris*, 300 F.3d at 1188 (citing *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 463 (N.D.Il. 2001).) Since those decisions, district courts continue to wrestle with this issue both in the context of §1981 and other newly enacted statutes with "roots" in previous laws. *Onyi v. Learjet, Inc.*, 2003 WL 124141 (D.Kan. Jan 6, 2003); *Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d 539 (D.Md. 2002); *Velez v. QVC, Inc.*, 227 F.Supp.2d 384 (E.D.Pa. 2002); *Donofry v. Autotote Systems, Inc.*, 795 A.2d 260 (N.J. Super.A.D. 2001); *Kinley v. Norfolk Southern Railway Co.*, 230 F.Supp.2d 770 (E.D. Ky. 2002); *Estrada v. Trager*, 2002

WL 31053819 (E.D.Pa. Sep 10, 2002); *Donoghue v. Doherty*, 2002 WL 1400293 (N.D.Ill. Jun 27, 2002); *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F.Supp.2d 385 (D.Mass. 2002); *Turner v. National R.R. Passenger Corp.*, 181 F.Supp.2d 122 (N.D.N.Y. 2002); *Davis v. Smithkline Beecham Corp.*, 2001 WL 1530365 (D.Del. Nov 29, 2001); *Campbell v. National R.R. Passenger Corp.*, 163 F.Supp.2d 19 (D.D.C. 2001); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001); *Jones v. Motorola, Inc.*, 2001 WL 864273 (N.D.Ill. Jul 30, 2001). The effect of this split in the circuits and within the district courts across the country is to have the same causes of action (and in theory the same defendant) subject to differing limitations periods within and between the circuits.

2. The Circuit Court decisions that hold that §1658 does not apply to the Civil Rights Act of 1991 conflict, in principle, with this Court's decision in *Rivers v. Roadway*, because *Rivers* held that the operative provisions of the Civil Rights Act of 1991 were new causes of action and not retroactive.

The Seventh and Third Circuit's decisions conflict, in principle, with this Court's decision in *Rivers v. Roadway*, 511 U.S. 298, 313-14 (1994). Section §1981(b) was enacted as part of the Civil Rights Act of 1991, which followed this Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court held that the words "to make" contracts limited §1981 to discrimination only in the formation of a contract. (*Id.* at 176-77) This deemed non-actionable post-contract claims of discrimination in the terms and conditions of employment, such as the claims that

Petitioners raise in this case. Consistent with the *Patterson* decision, this Court recognized in *Rivers v. Roadway Express*, 511 U.S. 298, 313-14 (1994) that §1981(b) created an entirely new cause of action when it held that the 1991 Civil Rights Act should not be applied retroactively. This Court found that the Act "enlarged the category of conduct that is subject to §1981 liability," and that its statement of purposes, instead of referring to "restoring" preexisting rights, describes the Act's function as "expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* The fact that §1981(b) of the 1991 Civil Rights Act is "framed as a gloss on section 1981's original ' make and enforce contracts' does not demonstrate an intent to apply the new definition to past acts." *Id.* at 308

If, as this Court has held, the new definition of "to make" contracts could not be applied to "past acts", it is inconceivable how the old definition could have any relevance in determining the application of the Civil Rights Act of 1991 to §1658. Without the enactment of the Civil Rights Act of 1991, Petitioners' claims in this case would not have existed.

The Seventh Circuit's finding that §1981(b) is "solely definitional" (*Jones v. R.R. Donnelley*, 305 F.3d 717, 727 (7th Cir. 2002)), not only conflicts in principle with this Court's decision in *Rivers*, but also undermines the breath and extent of the 1991 Civil Rights Act. When Congress enacted the Civil Rights Act of 1991, subsection (b) changed the very essence of the language codified as subsection (a). The fact that this Court found that the Civil Rights Act of 1991 was not retroactive showed unequivocally that the new law was not an explanation of an old act, but instead "created new causes of action that were not cognizable under the pre-1991 version of the statute". *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 462, 464-5 (N.D.Il., 2001).

As is explicit in this Court's decision in *Rivers* and as stated by the District Court, §1981 prior to the enactment of the 1991 Act, "protected just two rights: the right to make contracts, which 'extend[ed] only to the formation of a contract but not to problems that may later arise from the conditions of continuing employment,' and the right to enforce contracts, which 'embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.'" *Id.* at 461-2, citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-677 (1989). As the district court further held, it is "'emphatically the province and the duty of the judicial department to say what the law is,' *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and in *Patterson* the Supreme Court determined *not* that §1981 should be narrowed despite its original intent, but rather that the statute as enacted in 1866, was never meant to reach certain forms of conduct." *Jones*, 149 F.Supp.2d at 465, (emphasis added).

3. The Seventh Circuit's decision conflicts with the plain language of Section 1658 and renders the statute a virtual dead letter.

In finding that §1658 applied to Petitioners' case, the District Court followed the well-established principles of statutory interpretation established by this Court. The first and foremost analysis when interpreting a statute should be the "plain meaning" of the words that comprise the statute. *Kaiser Aluminum & Chemical Corp. v. Bonbon*, 494 U.S. 827, 835 (1990), citing *Consumer Product Safety Common v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]f the intent of [a statute] is clear," then the plain meaning is conclusive and the analysis need proceed no further. *Norfolk*

& Western Ry. Co. v. American Train Dispatchers, 499 U.S. 117, 128 (1991), quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Section 1658 clearly states that it applies to "a civil action arising under an Act of Congress enacted after the date of the enactment of this section..." 28 U.S.C. §1658. "Enact" means to make into law by authoritative act, Black's Law Dictionary 546 (7th Ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted". The term "civil action" is a term of art derived from the Federal Rules of Civil Procedure, which states that a "civil action" is commenced by the filing of "a complaint". Fed. R. Civ. P. 2 & 3.

The Civil Rights Act of 1991 was plainly an "Act of Congress" "enacted" after December 1, 1990, as Congress specifically used both words in the law's preamble, including using the phrase "be it enacted", and the 1991 law was not passed until November 1991, almost a year after the passage of §1658. The District Court properly held that §1658 unambiguously applies to Petitioners' §1981(b) action and that despite court decisions to the contrary, §1658 was not susceptible to more than one reasonable interpretation. *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 464 (N.D.Il. 2001). Therefore, Petitioners' civil action, which could not be brought under the pre-1991 version of §1981, "but which can be made only by virtue of §1981(b)," "clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658," and §1658 should apply to those claims. *Id.*

This Court recognized the plain and unambiguous language of §1658 when it explained that "[t]he expectation

[of borrowing limitations from state law] is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. §1658...which supplies a general, four-year limitations period for *any federal statute* subsequently enacted without one of its own." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) (emphasis added). Petitioners' lawsuit was filed under the Civil Rights Act of 1991, which is a federal statute enacted after December 1, 1990 and which provided no limitations period for Petitioners' claims. Therefore, under the plain and unambiguous language of §1658, any complaint, such as the Petitioners, that is filed under a federal statute that was enacted after December 1, 1990 has a four-year statute of limitations, unless the statute provides for its own limitations period.

Under the Seventh Circuit's interpretation, §1658 has been rewritten to apply only to a civil action arising "under any new Act of Congress established without reference to preexisting law". (*Jones* at 725) In order to reach the conclusion it did the Seventh Circuit had to ignore not only the established definition of "Act of Congress", but also the procedures of Congress in enacting legislation which is primarily through amendment. The holding is contrary to the plain language of §1658 and the consequences of this holding will, in effect, nullify the statute because nearly all Acts of Congress have "roots in" or "otherwise reference" preexisting law (for example, the Telecommunications Act of 1996 which has its roots in the Telecommunications Act of 1934, (*See, MCI v. Ill.Bell*, 1998 WL 156674 (N.D. Ill. 1998)).[1]

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[1] Legislation relating to regulation of the Internet, which is currently a hot area for congressional action is rooted in the Telecommunications Act of 1934. Similarly, the Securities and

This Court should reject the Seventh Circuit's decision that requires we ignore §1658 for all legislation passed after December 1, 1990, if that legislation has roots in or is otherwise dependent on, provisions of any Act that predates §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 725 n.5 (7th Cir. 2002). That interpretation requires the courts to ignore the plain language of §1658 and exclude amendments that create entirely new causes of action (like this one) and any new causes of action that refer or relate to previous Acts (which would include just about every Act of Congress passed within the last 100 years because Congress does nearly all its work through amendments). Petitioners respectfully submit that such an interpretation is untenable and suggest that this Court's task is to apply the plain language of §1658 or, if found ambiguous, to harmonize it with the clear intent of Congress, which was to establish a more uniform federal Statute of Limitations and to do away with "borrowing". Neither the means of statutory construction employed by the Seventh Circuit nor its ultimate conclusion satisfactorily resolve these issues.

Exchange Act of 1934 is the focus of much current legislation. In addition, under the panel's rationale, if Congress decided, for example, to enact federal legislation under §5 of the 14th Amendment, even though the legislation would be new, it would *not* be considered a new cause of action because its roots are in the Constitution. Therefore, under the Panel's interpretation even brand new acts of Congress *enacted after* §1658 would not partake of the four-year statute because its roots are found in the Constitution or Acts of Congress. Ironically even §1658, which established, for the first time, a uniform federal statute of limitations, has its roots in the Justice Act of 1985 and could ultimately be traced back to the Judiciary Act of 1789.

As quoted by the District Court, this Court has "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" "[J]udicial inquiry into the applicability of [a statute] begins and ends with what [a statute] says and with what [statute] does not." *Jones*, 149 F.Supp.2d at 463-4, quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-4 (1992). The District Court found that, "looking at the plain language of §1658, this seems to this Court to be an easy answer". *Id.* at 462.

4. The Seventh Circuit's decision is also contrary to the intent of Congress.

It is only when a statute is ambiguous that the courts review the legislative history of a statute in an attempt to determine Congressional intent. Petitioners respectfully suggest such an inquiry is not necessary here. However, if this Court determines it should look to the intent of Congress, as the Seventh Circuit did, the Seventh Circuit's decision is contrary to that intent because Congress intended to do away with "borrowing" and simplify the Federal Courts' task in determining statutes of limitations. The Seventh Circuit's decision instead complicates that task.

Prior to the enactment of §1658 many courts, including the Seventh Circuit, directed pleas to Congress to enact uniform federal statutes of limitations. "We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action." *Sentry Corp. v.*

Harris, 802 F.2d 229, 246 (7th Cir. 1986); *London v. Coopers & Lybrand*, 644 F.2d 811, 813 (9th Cir. 1981).

In response, Congress established the Federal Courts Study Committee, which issued a report critical of the practice of borrowing from state statutes. The Federal Courts Study Committee recommended that Congress adopt uniform limitations periods for federal claims rather than "borrowing" the most analogous state law limitations period. *See*, Fed. Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee, 93 (1990). Congress answered that call with the passage of §1658 and although Congress only enacted §1658 prospectively, the statute clearly states that it applies to all Acts of Congress enacted after December 1, 1990. *See*, 28 U.S.C. §1658. Under the Seventh Circuit's decision, however, the ameliorative function of §1658 has been replaced by a complex, virtually unworkable rule.

The Seventh Circuit held that the plain language of §1658 was ambiguous because it does not address the "eventuality when a cause of action arises under two different acts, one enacted before and one enacted after the effective date of §1658." *Jones v. R.R. Donnelley*, 305 F.3d 717, 724 (7th Cir. 2002). Petitioners respectfully disagree with the Seventh Circuit's premise that the statute did not address causes of action arising under two acts and disagree that their cause of action falls under two Acts. It does not.

Petitioners' cause of action falls under *one act*, the 1991 Civil Rights Act. The Civil Rights Act of 1991 was clearly enacted after §1658 and until that Act Petitioners did not have a viable cause of action. In addition, §1658 as amended *does* address the situation of when a cause of action arises under two different statutes, and the amended Statute

clearly shows that acts of Congress enacted after December 1, 1990, which have their roots in pre-existing statutes, are subject to the four-year statute unless specifically exempted under §1658. Congress amended §1658 on July 30, 2002 to establish that the amendments to Securities and Exchange Act of 1934 that took place in 2002 (The Sarbanes-Oxley Act 15 U.S.C. §7201) would not use the statute of limitations found in §1658 but would instead have its own statute of two and five years. It is clear from that amendment that Congress understood that the four-year statute *would have* applied to those actions had they not amended §1658.

The Seventh Circuit's interpretation is unworkable and contrary to congressional intent because it, in effect, rewrites the definition of "Act of Congress", tells Congress that it will not treat "new" legislation as new legislation unless Congress abandons its current practice of working through amendments; and, forces Congress to repeat in its legislation the full text of any other section on which the new bill relies or references if it wishes the court to recognize the new act as "new". Surely this Court does not want to be in the position of requiring Congress to pass completely new sections of the Code each time it enacts legislation in order to achieve the result it clearly stated in §1658.

5. Section 1988 mandates that the courts first look to federal law before referring to state law in actions brought under the civil rights acts.

Both this Court and Congress direct that before a state statute of limitations can be applied to petitioners' civil rights claim, there must be an examination of whether there is an applicable federal rule or statute. The Seventh Circuit's

holding ignores the reasoning of this Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 268-269 (1985), where it stated:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. [Footnotes eliminated]. In 42 U.S.C. §1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts. The language of §1988, [footnote eliminated] directs the courts to follow "a three-step process" in determining the rules of decision applicable to civil rights claims: "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. §1988]. If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum State. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' Ibid." quoting from *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). *Id.* at 260-261. (emphasis added)

The Court then went on to state:

> Our identification of the correct source of law properly begins with the text of §1988. [footnote eliminated]. Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law -- the second step in the process -- should not be undertaken before principles of federal law are exhausted. *Id.* at 261.

See also, *Chardon v. Fumero Soto*, 462 U.S. 650, 663 (1983) (Rehnquist, dissenting) ("If there is any federal law "adapted to the object" of the civil rights laws, 42 U.S.C. §1988 commands that federal courts apply that law in civil rights actions. The question is whether there is any federal rule of law applicable to the limitations issue. If there is, the court must depart from the general rule of reference to state law in actions brought under the civil rights laws") (emphasis added).

As this Court has already recognized, in *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) the expectation of borrowing limitations from state law was reversed for statutes passed after December 1, 1990. Therefore, because there is a federal law applicable to the limitations issue (§1658) that statute should apply to petitioners' §1981(b) claims. *See also, Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998) (remanding case to lower court to consider whether §1658 required the application of the four-year statute of limitations to §1981 claims).

CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Petitioners ask this Court to grant this petition for a Writ of Certiorari and find that the four-year statute of limitations set forth in 28 U.S.C. §1658 applies to all civil actions arising under Acts of Congress enacted by Congress after December 1, 1990, (unless otherwise provided by law) whether or not those civil actions are based on amended laws or laws that have roots in or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed November 21, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,

v.

R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Upon consideration of the Plaintiffs-Appellees' petition for rehearing *en banc*, filed on September 27, 2002, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed September 16, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before RIPPLE, KANNE and EVANS, Circuit Judges.

OPINION

RIPPLE, *Circuit Judge*. Several classes of plaintiffs brought suit against their former employer, R.R. Donnelley & Sons ("Donnelley"), for race discrimination pursuant to 42 U.S.C. § 1981. Before the court is a single certified question: "Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state?" R. 248 at 2. The district court determined that § 1658 provided the applicable statute of limitations for the plaintiffs' claims. Because we find ourselves in respectful disagreement with the district court, we reverse its decision and remand the case for further proceedings consistent with this opinion.

I BACKGROUND

A.

The plaintiffs are members of three classes of African-American former employees of Donnelley's Chicago Manufacturing Division, many of whom were terminated or transferred from their employment on or before July 29, 1994, in connection with the closing of that facility.[1] Their

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[1] The district court certified three classes of employees:

> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;
>
> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1991 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.);
>
> All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (c) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to present and were subjected to racial harassment so pervasive as to create a hostile working environment.

R. 230 at 39. The present issue concerns those individuals belonging to all of the classes whose employment was terminated on or about July 29, 1994.

claims against Donnelley include discriminatory transfer, discriminatory termination and racially hostile work environment. They filed their initial pleading in this case on November 25, 1996.

In its answer, Donnelley raised the statute of limitations as an affirmative defense; Donnelley claimed that the "alleged 42 U.S.C. § 1981 claims which arose more than two years prior to the filing of the complaint are barred by the applicable statute of limitations." R. 2 at 16. Soon after filing its answer, Donnelley moved for summary judgment on the

claims of those plaintiffs whose employment was terminated on or around July 29, 1996.[2] According to Donnelley, this court's decision in *Smith v. City of Chicago Heights*, 951 F.2d 834, 836 n.1 (7th Cir. 1992), established that Illinois' two-year statute of limitations for personal injury claims was the applicable statute of limitations for claims of race discrimination arising in Illinois and brought under 42 U.S.C. § 1981. *See* R. 10 at 2. Because the complaint was not filed until November 1996, more than two years after the plaintiffs' last employment at Donnelley, their claims were time-barred.[3]

In their response, the plaintiffs presented three reasons why their claims should be considered timely. First, the plaintiffs argued that the termination of their employment was part of a larger program of discrimination by Donnelley and that, consequently, "no statute of limitations should be imposed in this case." R. 102 at 4. In the alternative, the plaintiffs submitted that the appropriate statute of limitations for violations of 42 U.S.C. § 1981 was the four-year statute of limitations provided in 28 U.S.C. § 1658. Specifically, the plaintiffs maintained that their claims arose under amendments to § 1981 enacted through the Civil Rights Act of 1991. Their claims, therefore, arose under the 1991 Civil Rights Act, a law enacted after § 1658, and therefore were subject to § 1658's four-year statute of limitations. Finally, the

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[2] Donnelley's motion was not confined to the statute of limitations issue, but included other issues that are not before the court on this appeal.

[3] Donnelley also represented this issue at least two other times later in the litigation before the district court ruled on the motion.

plaintiffs argued that the doctrines of equitable estoppel and equitable tolling should apply to extend the statute of limitations to allow the plaintiffs to maintain their claims.

B.

The parties eventually narrowed the issue to be resolved by the district court: The appropriate statute of limitations to apply to the claims of those plaintiffs whose employment was terminated in conjunction with the closing of the Chicago facility. The district court began its analysis by looking at the language of § 1981 prior to the adoption of the 1991 Civil Rights Act:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). The court then noted that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), the Supreme Court had interpreted § 1981 to protect just two rights:

> the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the

> conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."

R. 244 at 4 (quoting *Patterson*, 491 U.S. at 176-77). Consequently, after *Patterson* was handed down, § 1981 had a very limited scope that did not include claims for discriminatory termination or hostile work environment.

As part of the Civil Rights Act of 1991, the district court noted, Congress amended § 1981 to define "'make and enforce contracts' to include 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* (quoting 42 U.S.C. § 1981(b)). Under this language, aggrieved employees could pursue claims of discrimination based upon events that occurred during the course of their employment.

After reviewing this evolution of § 1981, the district court turned to the question of the appropriate statute of limitations for claims brought under § 1981. The court acknowledged that courts considering claims under § 1981 historically have applied the personal injury statute of limitations of the forum state. *See id.* However, the court believed that "this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal 'catch-all' statute of limitations." *Id.* Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress

enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).[4] Noting that § 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990, the district court took the view that "An Act of Congress enacted" was not "susceptible to more than one reasonable interpretation." R. 244 at 8 (internal quotation marks omitted).

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[4] Until July 30, 2002, § 1658 only consisted of the quoted language. However, on that date, Congress amended § 1658 by designating the quoted language as subsection (a) and adding subsection (b) which provides:

> Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of --
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 804(a), 116 Stat. 745, 801 (2002). Nothing in the amendment affects the language of now subsection (a) or the analysis of that subsection contained in this opinion.

"Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight.

Id. (internal citations omitted). The court went on to note that the preamble to the Civil Rights Act of 1991 both defines it as "An *Act* to amend the Civil ,Rights Act of 1964 . . ." and also begins with "Be it *enacted* . . . ." *Id.* (emphasis in original and internal quotation marks omitted). The court also found it unambiguous that "arising under" meant "stemming from" or "originating in." *Id.* (internal quotation marks and citations omitted). The court concluded that the meaning of § 1658 was that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.*

The court then applied its interpretation of § 1658 to the facts presented. The court stated that § 1981 claims allowed by *Patterson* "clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims." *Id.* at 8-9. However, "claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 9. Therefore, the district court concluded that § 1658 applies to that latter class of claims.

The court acknowledged that its decision was contrary to the only court of appeals decision to address the issue, *see Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000), as well as the majority of the district courts. Quoting the Third Circuit, the district court read *Zubi* as based on the rationale that Congress, in enacting the 1991 legislation, had chosen "to build upon a statutory text that has existed since 1870," and therefore "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." R. 244 at 5 (quoting *Zubi*, 219 F.3d at 225-26). The district court could not "imagine how this [was] possible," because "in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by *Zubi* (discriminatory firing) *did not* arise under the pre-1991 version of § 1981." R. 244 at 5. The district court then summarized its holding:

> The Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work

> environment claims) arise under the 1991 Act, and are therefore governed by § 1658's four-year statute of limitations. . . . *Id.* at 10-11 (internal citations omitted).

C.

After the district court issued its memorandum opinion, Donnelley requested that the court certify the issue of the appropriate statute of limitations for immediate review. Determining that the criteria for an immediate appeal pursuant to 28 U.S.C. § 1292(b) had been met, the district court granted the defendant's motion to certify the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

R. 248 at 2. By order of August 21, 2001, this court allowed Donnelley to pursue its appeal.

II DISCUSSION

To determine the appropriate statute of limitations, we must interpret two federal statutes; accordingly, we review the district court's interpretation de novo. *See, e.g.,*

Zambrano v. Reinert, 291 F.3d 964, 968 (7th Cir. 2002) (reviewing question of statutory and constitutional interpretations de novo); *see also Zubi*, 219 F.3d at 221 (reviewing de novo the question of the appropriate statute of limitations for § 1981 actions after the enactment of § 1658).

Prior to the enactment of § 1658, it was clear that the proper statute of limitations for § 1981 actions was the forum state's statute of limitations for personal injuries. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 837 n. 1 (7th Cir. 1992) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987)). The plaintiffs maintain, however, that three intervening judicial and legislative events have occurred that alter the existing rule. First, the Supreme Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), that § 1981 only granted two discrete rights: the right to make contracts, which "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment," and the right to enforce contracts, which "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 176-77. Second, in 1990, Congress enacted a uniform catch-all statute of limitations that provided a four-year statute of limitations for "civil actions arising under an Act of Congress" enacted after the effective date and for which a specific statute of limitations was not provided. Third, Congress amended § 1981 by way of the Civil Rights Act of 1991; specifically, it redefined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the

contractual relationship." 42 U.S.C. § 1981(b). Because their actions "arise under" the 1991 Civil Rights Act, § 1658 provides the applicable statute of limitations.

In reply, Donnelley submits that Congress intended § 1658 to apply only to wholly new causes of action and not those built upon existing statutory schemes. According to Donnelley, "neither the statutory language of § 1658 nor this Court's jurisprudence on statutory interpretation sanctions" the plaintiffs' reading of § 1658. Appellant's Br. at 6. We shall consider these arguments below.

As with any statutory interpretation question, determination of the meaning and application of § 1658 to the § 1981 claims at issue must begin with the statutory language of both provisions. *See Masters v. Hesston Corp.*, 291 F.3d 985, 989 (7th Cir. 2002) ("The interpretation of a statute is a question of law, which we review *de novo.*"). Prior to the adoption of the Civil Rights Act of 1991, § 1981 stated:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). Until the Supreme Court's decision in *Patterson*, courts generally interpreted § 1981 to

encompass causes of action for race discrimination that occurred at any point during the employment relationship. *See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (upholding jury verdict of discriminatory treatment and termination under § 1981). However, the Supreme Court in *Patterson* held that § 1981 should be interpreted more narrowly:

> The conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment. . .
>
> This type of conduct, reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

Patterson, 491 U.S. at 179. As part of the Civil Rights Act of 1991, Congress enacted an amendment to § 1981 that "reversed" the *Patterson* decision. Specifically, Congress added a subsection to § 1981 that defined "make and enforce contracts" broadly; the current version of § 1981 states:

> § 1981. Equal rights under the law
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added). Consequently, under the amended § 1981, an employee may bring a cause of action against his employer for discriminatory conduct that occurs after the employment relationship is formed.

Section 1981 does not contain its own statute of limitations. Consequently, prior to § 1981's amendment in 1991, courts applied the most analogous state statute of limitations to actions brought under that section. *See*

Goodman v. Lukens Steel Co., 482 U.S. 656, 660, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987) ("Because § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations."). For actions brought in Illinois, this court has determined that Illinois' two-year statute for personal injury claims is most analogous. *See, e.g., Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied*, 530 U.S. 1204, 147 L. Ed. 2d 233, 120 S. Ct. 2197 (2000) (applying Illinois' two-year statute of limitations for personal injury claims to a cause of action brought pursuant to § 1981).

The plaintiffs maintain that, at least with respect to § 1981 actions that were barred by the *Patterson* decision, 28 U.S.C. § 1658 now provides the applicable statute of limitations. We look therefore to the language of § 1658 to determine if it applies to any claims brought under § 1981. Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).

Certainly, the plaintiffs' claims are "civil actions." The central question therefore is whether their claims "arise under an Act of Congress enacted after the date of the enactment of this section." The district court equated "arising under" with "'stemming from' or 'originating in. '"R. 244 at 8 (quoting Black's Law Dictionary 102 (7th ed. 1999)). In the district court's view, claims prohibited by *Patterson*, "but which can be made only by virtue of § 1981(b), . . . clearly arise under the Civil Rights Act of 1991. . . ." *Id.* In essence,

the district court believed that the plaintiffs' claims "arise under" the 1991 Civil Rights Act because, by virtue of *Patterson*, those claims could not have been brought prior to the passage of the 1991 Act.

We respectfully disagree, however, that the plain language of § 1658, standing alone, compels the conclusion that § 1658 must apply to every statute subject to any amendatory action by Congress. The language of § 1658 addresses only a "civil action" that "arises under" an act adopted after § 1658's effective date. The language simply does address the eventuality when a cause of action "arises under" two different "Acts," one enacted before and one enacted after the effective date of § 1658. Consequently, we must look not only at the language of § 1658 and § 1981, but also the structure and history of those statutes to determine whether § 1658 provides the applicable statute of limitations for the plaintiffs' claims. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 326-27 (7th Cir. 1995) (stating that a court may look beyond the text of a statute where the language is ambiguous, where a literal interpretation would lead to "absurd results" or where a literal interpretation would "thwart the goals of the statutory scheme").

At the outset of our inquiry, we remain focused on the language and structure of § 1658. By its terms, § 1658 applies to civil actions "arising under an Act of Congress *enacted* after the date of the enactment of this section . . . ." 28 U.S.C. § 1658 (emphasis added). As noted by one of our sister circuits, "the phrase 'an Act of Congress enacted' after 1990 is not equivalent to the phrase 'an Act of Congress enacted or amended' after that year." *Madison v. IBP, Inc.*,

257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002).[5] "Amendments vary in their purpose, and the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000). The difficulty in discerning a technical from a substantive amendment, or an amendment that modifies an

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[5] In *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002), the plaintiffs had brought Title VII claims as well as § 1981 claims. With respect to the plaintiffs' Title VII claims, the Eighth Circuit ruled that because Title VII has a 300 day limitations period, the district court should have instructed the jury that Madison could only recover damages under Title VII for illegal acts occurring within the 300 day period prior to the filing of her administrative charge. Since Madison filed her charge on January 13, 1995, she was entitled to recover damages under Title VII only for acts of discrimination or harassment occurring after March 19, 1994. The court therefore erred in instructing the jury that she could recover punitive damages under Title VII for illegal acts occurring after January 13, 1993.

Id. at 797. However, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2077 (2002), the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." It was in light of its decision in *Morgan* that the Supreme Court vacated the decision of the Eighth Circuit in *IBP*. *See Madison v. IBP, Inc.*, 153 L. Ed. 2d 773, 122 S. Ct. 2583 (2002). The Supreme Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to the § 1981 claim.

existing civil action from one that creates a wholly new one, has led two of our sister circuits to reject a reading of § 1658 that would call for such guess work. According to the Eighth Circuit, "when Congress amends a preexisting statute, it does not create a 'new act, 'and claims arising under the statute as amended continue to arise under the preexisting statute. It is, thus, only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

The purpose behind § 1658 confirms the significance of the distinction drawn by the Eighth Circuit. In enacting this section, Congress sought to alleviate the uncertainty inherent in the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain their own limitations periods:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. As pointed out by the Study Committee:
>
> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, at 24. Notably, Congress also was concerned with disrupting litigants' settled expectations and therefore made § 1658 prospective. This concern is reflected in the House Report as well:

> Section 111 addresses this problem by creating a four-year fallback statute of limitations, applicable to legislation enacted after the effective date of this Act, which creates a cause of action but is silent as to the applicable limitations period.
>
> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective

> parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

Id. We believe that Donnelley's proposed interpretation of § 1658 is most compatible with this interest in certainty and in honoring settled expectations. Under this approach, plaintiffs do not have to guess whether their action arose under the original enactment or its amendment. Section 1658, therefore, applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment.

The plaintiffs maintain that their proposed interpretation of § 1658 provides certainty and, at the same time, does not disrupt litigants' expectations. According to the plaintiffs, because the type of claims on which they seek relief did not exist post-*Patterson* and pre-§ 1981(b), there are no settled expectations to disrupt with respect to the statute of limitations to apply to such claims. "At first blush," the plaintiffs' interpretation does appear "to promise a fair degree of certainty in application"; if the newly enacted statute created a cause of action that did not exist previously, then § 1658 applies. *Zubi*, 219 F.3d at 224. "But that promise," as the Third Circuit has explained, "upon reflection, seems to us illusory." *Id.*

> First, as we have pointed out, [this] interpretation results in different statutes of limitations being applied to plaintiffs suing

> under the same statute depending on the particular facts of their claims. Thus, for example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another. Adoption of such an interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid.
>
> Recognition of two classes of plaintiffs under § 1981, when applied in a state with a statute of limitations for § 1981 claims larger than four years, is likely to result in unsuspecting plaintiffs who have relied on established precedent finding themselves barred from relief. Conversely, recognizing two classes, when applied in a state with a statute for § 1981 claims shorter than four years, is likely to result in defendants finding themselves faced with potential liability on claims they believed extinguished.

Id.

We believe that the Third Circuit's interpretation is most consonant with the purpose of § 1658 and the balance struck by Congress between the need for uniformity and the need to preserve settled expectations. Under this formulation,

> when an Act of Congress passed after December 1, 1990, amends a statute existing before that date, as opposed to creating a new law without reference to previously existing statutory language, all claims accruing after the passage of the amendment arise under an Act of Congress enacted before December 1, 1990, without regard to whether an identical claim arising earlier could have been successfully pursued under the prior statute.

Zubi, 219 F.3d at 222. Thus, it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "arises under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

That this structural formation of the revised § 1981 is no accident is clear when we turn to the history of the amendment. There is no question that reversing the *Patterson* decision was the driving force behind the enactment of § 1981(b). *See* H.R. Rep. No. 102-40 (I), at 88-92 (1991) (explaining the need to overrule *Patterson* and that the act "would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b)"). Notably, Congress chose to overrule *Patterson* not by creating an entirely new statutory provision. Indeed, Congress did not alter the original language of § 1981 (now § 1981(a)), which provides the basic right of recovery for an individual whose constitutional rights have been violated; instead, Congress merely supplied a more precise definition to one of the rights already guaranteed by § 1981 -- the right "to make and enforce contracts." Congress could have overruled *Patterson* in a number of ways. Instead of creating a wholly new cause of action, Congress merely defined the term "make and enforce contracts" for the purpose of the old § 1981, now § 1981(a). Congress' action therefore evinces a desire to tie the new cause of action to the existing § 1981.

Moreover, it is highly significant that, when Congress passed the Civil Rights Act of 1991 with the amendments to § 1981 contained therein, it believed that the applicable state statute of limitations for personal injury claims would continue to apply to § 1981 claims:

> But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations

> period in section 1981, courts applying the statute have looked to analogous state statutes of limitations. These statutes typically allow two or three years, and allow up to six years in some states.

H.R. Rep. No. 102-40 (I), at 63 (1991). Consequently, although Congress had enacted § 1658 the year before, it did not view its passage as having altered the practice of borrowing state statutes of limitations for purposes of § 1981.

Finally, we also are persuaded by the considered opinions of two of our sister circuits that adopted the approach set forth here. In *Zubi* and *IBP*, the Third and Eighth Circuits both concluded that § 1658 did not affect the statute of limitations for § 1981 claims such as those brought by the plaintiffs. Those courts determined that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Zubi*, 219 F.3d at 225; *IBP*, 257 F.3d at 798 (quoting same). Because "the Civil Rights Act of 1991 was not the type of enactment Congress intended to include in the § 1658 four year limitations period," those courts applied the personal injury statute of the forum state. *IBP*, 257 F.3d at 798. We join those circuits in determining that § 1658 does not provide the applicable statute of limitations for claims of discrimination based on actions occurring after the employment relationship is formed.[6] Instead, the statute of limitations for those claims,

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[6] For the reasons set forth in this opinion, we respectfully disagree with the decision of the Tenth Circuit in *Harris v. Allstate Insurance Co.*, 2002 U.S. App. LEXIS 16509, 2002 WL 1874825 (10th Cir. Aug. 15, 2002). In *Harris*, the Tenth Circuit drew

as for all § 1981 claims, remains the most analogous statute of limitations, here Illinois' two-year statute of limitations for personal injuries.

Conclusion

28 U.S.C. § 1658, as it applies to claims brought pursuant to § 1981, is susceptible to more than one textually plausible reading. Based on the text, the structure of the statutes and the legislative history of those sections, we conclude that § 1658 does not apply to the plaintiffs' claims brought pursuant to § 1981. Consequently, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Donnelley may recover its costs on this appeal.

REVERSED AND REMANDED

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heavily from the analysis of the district court in the present case and also of the dissenting judge in *Zubi*. Specifically, relying on the district court's reasoning that the Civil Rights Act of 1991 was an "Act of Congress enacted" after December 1, 1990, the Tenth Circuit held that " § 1658 applies to claims brought under § 1981(b), but not to claims brought under § 1981(a)." 2002 U.S. App. LEXIS 16509, [WL] at *6-9. As noted above, however, we do not believe the plaintiffs' claims "arise under" only § 1981(b), and, therefore, courts must look to the text, structure and purpose of both § 1981 and § 1658 to determine the correct statute of limitations. When this more complete context is considered, we believe that the correct statute of limitations for all § 1981 actions is the closest analogous state statute of limitations.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 98 C 4025, Case No. 96 C 7717

[Filed June 8, 2001]

JONATHAN ADAMS, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS, a Delaware Corporation,
Defendants.

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS,
Defendant.

JUDGES:
MATTHEW F. KENNELLY, United States District Judge.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley & Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley*, 2001 U.S. Dist. LEXIS 4247, *69, Nos. 98 C 4025, 96 C 7717, *2001 WL 336830,* at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue--the appropriate statute of limitations to be applied to plaintiffs' claims--arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the

question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all" statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after December 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley*, 1999 U.S. Dist. LEXIS 1592, No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb. 11, 1999); because "the addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, § 1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of

the CMD and all the named plaintiffs identified and designated by the defendant in its motion. *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated that the Court "expressed no opinion on the correctness of Judge Levin's analysis of . . . the applicability of 28 U.S.C. § 1658's four-year statute of limitations to actions brought under 42 U.S.C. § 1981 (b)." *Jones v. R.R. Donnelley, 1999 U.S. Dist. LEXIS 1592,* No. 96 C 7717, *1999 WL 639180,* at *2 (N.D. Ill. Aug. 17, 1999). In short, we are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, § 1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised § 1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of § 1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because § 1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.*, 482 U.S. 656, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. §

1658, the federal "catch-all" statute of limitations. Section 1658 provides that "except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of § 1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law. . . ." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of § 1981. *See Patterson*, 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . ."). Rather, such claims can be made only by virtue of Congress' 1991 enactment of § 1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether § 1658 actually applies to § 1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, 1998 U.S. App. LEXIS 5774, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine*, 2000 U.S. App. LEXIS 33891, *6, No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit *have* considered and resolved the issue--to conflicting ends. *Compare Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304 (D. Kan. 1997) (holding that § 1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.*, 1998 U.S. Dist. LEXIS 4745, No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.*, 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.*, 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that § 1658 does not apply

to § 1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered § 1658's impact in the context of a § 1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to § 1983--which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate, 220 F.3d 1213, 1217-18 (10th Cir. 2000)*. Applying this reasoning to § 1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under § 1981(b), a post-§ 1658 enactment that *does* create a cause of action--though this is by no means a foregone conclusion.

In addition to these circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that § 1658 does not apply to any § 1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see, e.g., Coleman v. Shoney's, Inc.*, 145 F. Supp. 2d 934, 2001 WL 526673 (W.D. Tenn. 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D. Ala. 1998); *Hall*, 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies*, 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that § 1658 applies to all § 1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Tenn. 1999); and some have concluded that § 1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations,

depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander*, 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458, No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996). We think the last holding is the only one true to the language of the statute.

Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992). Section 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *4; *Lane*, 13 F. Supp. 2d at 1270; *Davis v. State of California Department of Corrections*, 1996 U.S. Dist. LEXIS 21305, *57, No. S-93-1307DFL GGH, 1996 WL 271001, at *18-*19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F. Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the

Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

> An *Act* to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.
>
> Be it *enacted* by the Senate and House of Representatives of the United States of America in Congress assembled, . . . Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in § 1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See Black's Law Dictionary* 102 (7th ed. 1999).

In short, the meaning of § 1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to § 1981, claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims

that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658. Section 1658 applies to those claims. Having concluded that the language of the statute is unambiguous, we need not consider the statute's legislative history. *See Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that § 1658 does not apply to any claims under § 1981, including claims given life by § 1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" § 1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin*, 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" § 1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), and in *Patterson* the Supreme Court determined not that § 1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach

certain forms of conduct. *Patterson*, 491 U.S. at 176-77. When Congress enacted § 1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create new types of claims. *See, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *5; *Davis*, 1996 U.S. Dist. LEXIS 21305, 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether § 1658 governs every post-1990 legislative amendment; the Court must decide only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by § 1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of § 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

MATTHEW F. KENNELLY
United States District Judge